



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 21 2005

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Reminder That Waiver is Required for Supplemental Environmental Projects Not Meeting All Conditions of SEP Policy

FROM: Walker B. Smith, Director *WBS*
Office of Civil Enforcement

TO: Regional Counsel, I-X
Enforcement Division Director, I-X
Division Directors, OCE

The purpose of this memorandum is to remind Headquarters and Regional enforcement staff that if they want to receive SEP credit at the end of the fiscal year for a project, absent a waiver, the project must meet the conditions of the May 1998 SEP policy. Enforcement staff must include information in the Agency's enforcement case file that shows the project meets the SEP Policy, and document how the final penalty amount meets the minimum penalty requirements of the SEP Policy.

If a project does not meet the conditions of the SEP Policy and a Region or Headquarters wants to claim SEP credit for that project, the Region or Headquarters division managing the case must obtain a waiver of such SEP Policy conditions. The waiver must be approved by the Assistant Administrator of OECA prior to the settlement being finalized. The most common instances in which a waiver is required are 1) when the settlement does not comport with the SEP Policy's minimum civil penalty requirements¹ (the greater of 25% gravity or 10% gravity plus economic benefit); and 2) when the mitigation credit for the SEP exceeds the maximum allowable amount (generally 80%).² In no event can the nexus requirement of the SEP Policy be

¹ For example, in the event of a global settlement, such as those negotiated for refineries and utility cases, strict adherence to the SEP Policy's minimum penalty amounts may not be feasible.

² In addition, enforcement staff are reminded that, as a condition of the SEP Policy, projects falling into the "Compliance Promotion" or "Other" SEP categories must receive prior

waived. If a project does not satisfy the SEP Policy conditions and a waiver of the SEP Policy has not been granted by the AA/OECA, the project should be entered as injunctive relief for end-of-year reporting purposes.

Should you have any questions on this matter, or the SEP Policy in general, please contact the Headquarters SEP Policy contacts, Beth Cavalier (202-564-3271) or Melissa Raack (202-564-7039). For questions about SEPs arising in federal facility cases, please contact Melanie Garvey (202-564-2579). For questions about SEPs arising in site remediation cases (e.g., ones arising under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or Section 3008(h) of the Resource Conservation and Recovery Act (RCRA)), please contact Michael Northridge (202-564-4263).

cc: K. Dworkin, USDOJ
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HQ approval. See July 21, 1998 memorandum, "*Revised Approval Procedures for Supplemental Environmental Projects.*"